

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BELL v BAILEY & Anor (Appeal) [2025] ACAT 56

AA 54/2024 (XD 95/2023)

Catchwords: **APPEAL** – civil dispute – whether Original Tribunal erred by determining proceedings in appellant’s absence – whether appellant served with civil dispute application – whether Original Tribunal erred in finding that the Facebook page which was “served” by Facebook Messenger application was operated by the appellant – Whether Original Tribunal erred in drawing an inference of consent to service of concerns notice by Facebook Messenger, for the purposes of the *Electronic Transactions Act 2001*– Whether Original Tribunal erred in finding that a concerns notice may be served by Facebook Messenger within section 8 of the *Electronic Transactions Act 2001* – Whether Original Tribunal erred in finding that the respondent to the appeal had established serious harm within section 122A of the *Civil Law (Wrongs) Act 2002* - Whether the Original Tribunal erred in finding that the appellant was the publisher of defamatory material – Whether the Original Tribunal erred in its award of damages

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008*, ss 7A, 15, 16, 17, 18, 22, 47A, 56, 82
Civil Law (Wrongs) Act 2002, ss 115, 118, 122A, 124A, 124B, 139O
Civil Law (Wrongs) Amendment Act 2024
Commonwealth Electoral Act 1918 (Cth), s 101
Electoral Act 1992 (Qld), s 65
Electronic Transactions Act 2001, ss 5, 8, Dictionary
Electronic Transactions Bill 1999 (Cth)
Electronic Transactions Bill 2000
Magistrates Court Act 1930, s 262, part 4.2
Service and Execution of Process Act 1992 (Cth), ss 3, 5, 47, 48, 50; Part 4, Div 2

Subordinate

Legislation cited: ACT Civil and Administrative Tribunal Procedures Rules 2020 (repealed), rules 19, 20, 21, 24, 26, 28, 29, 35
ACT Civil and Administrative Tribunal Procedures Rules 2024, rule 91
Service and Execution of Process Regulations 2018 (Cth)

Cases cited

Amer v Eriksson [2019] ACAT 108
Bailey v McCrae & Ors [2023] ACAT 51
Bailey v McCrae & Ors [2024] ACAT 82
Briginshaw v Briginshaw [1938] HCA 34
Cassell & Co Ltd v Broome [1972] AC 1027
City of Stirling v Dueschen [2011] WASC 126
Dow Jones & Co Inc v Gutnick [2002] HCA 56
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27
Faithfull v Woodley (1890) 43 Ch D 287
Flo Rida v Mothership Music Pty Ltd [2013] NSWCA 268
Google LLC v Defteros [2022] HCA 27
Greenwich v Latham [2024] FCA 1050
Humphries v TWT Ltd (1993) 120 ALR 693
Jones v Dunkel [1959] HCA 8
Kolodzeij v Ali & Anor [2021] ACAT 114
Krutsky v Commissioner for Social Housing [2023] ACAT 68
Lazarus v Azize [2015] ACTSC 344
L&B Linings Pty Ltd v WorkCover Authority of New South Wales [2012] NSWCA 15
Mansour v Dangar [2017] ACAT 49
Newsnet Pty Ltd v Patching [2011] NSWSC 690
Rader v Haines [2022] NSWCA 198
Riley v St Vincent De Paul Society Canberra/Goulburn [2025] ACAT 16
Supaphien v Chaiyabarn [2023] ACTSC 240
Wilson v Bauer Media Pty Ltd [2017] VSC 521
Wilson v Mendelsohn & Ors [2024] EWHC 821

List of Texts/Papers cited:

Tribunal: Presidential Member J Lucy

Date of Orders: 13 August 2025
Date of Reasons for Decision: 13 August 2025
Date of Publication: 20 August 2025

**AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL)**

AA 54/2024

BETWEEN:

JESSE BELL
Appellant

AND:

KATRINA BAILEY
First Respondent

AND:

DEAN MCCRAE
Second Respondent

APPEAL TRIBUNAL: Presidential Member J Lucy

DATE: 13 August 2025

ORDER

The Tribunal orders that:

1. Appeal dismissed.

.....
Presidential Member J Lucy

REASONS FOR DECISION

Introduction

1. Mr Bell appealed against a decision of the Original Tribunal ordering him to pay \$5,000 in general damages and \$5,000 in aggravated damages to the first respondent, Ms Bailey, in respect of a defamatory publication. Mr Bell took no part in the proceedings before the Original Tribunal.
2. Mr Bell claimed, on appeal, that the Original Tribunal had erred in various respects. These included that he had not been served with the application; that the concerns notice had not been properly or lawfully served; that the Tribunal erred in finding that Ms Bailey had established that the publication of defamatory matter caused serious harm to her; that it had erred in finding that he had published the defamatory material; and that it had made various errors affecting its award of damages.
3. Mr Bell has not persuaded me that any of his grounds of appeal should be upheld. Accordingly, I have decided to dismiss the appeal.

Background

4. On 4 February 2022, the Resolute TV YouTube channel published a live video entitled “D.O.T. Pedophiles (sic) Rule the World” in which the appellant, Mr Jesse Bell, interviewed Mr Luke McKee (the **Video**). The Video includes statements made by Mr McKee that impute that the first respondent, Ms Katrina Bailey, was a member of an organisation whose members sexually abuse children and engage in child trafficking activity.
5. On 6 February 2022, a person operating the “Jesse Bell” Facebook account posted in relation to the Video: “This man who is an Australian political refugee proves forensically the people involved in the pedo cult in Australia...”. Mr Bell provided a link to the Video on YouTube and on Facebook.
6. Ms Bailey exchanged messages via Facebook Messenger in 2022 with persons operating the accounts of Mr Bell and Mr McCrae after she became aware of the Video.

7. On 3 April 2022, a person operating the “Jesse Bell” Facebook account sent Ms Bailey a Messenger message stating:

Hey mate. I got off the phone with Dean Mcrae [sic] just before. He and I are agreed that if you need protection we will provide it. We don't like women and girls being threatened or harmed. ...

8. Ms Bailey replied on the same day, in an elevated manner, expressing the opinion that Mr Bell helped Mr McKee call her part of “that group” and that he put “us” in danger, including by publishing her name and where to find her.
9. On 7 November 2022, Ms Bailey sent a “concerns notice” (which must be given to proposed defendants before commencing defamation proceedings) to Facebook Messenger accounts in the names of Mr McCrae, Mr Bell and Dia Beltran. The account of Dia Beltran was said to be operated by a Ms Claudia Benitez.
10. On 22 December 2022, the operator of the “Jesse Eurekanzo” Facebook account, which Ms Bailey claims was operated by Mr Bell, sent a message to Ms Bailey, stating: “Come after me bitch. Dean and I offered you protection and you go after Dia. Dean and Dia had nothing to do with the interview.”
11. On 23 December 2022, the operator of the “Jesse Eurekanzo” Facebook account sent another message to Ms Bailey, stating: “you cannot prosecute a civil case from another State or Territory.”
12. On 24 December 2022, “Jesse Bell” referred in a Facebook post to his interview of Luke McKee then stated: “Then myself and the owner of the platform were threatened with legal action.” He said that person “backed off” then Ms Bailey “waited until Christmas to threaten me and two of my mates the same way”.
13. On or around 28 December 2022, the operator of the “Jesse Bell” Facebook account posted:

Short story long I interviewed a bloke called Luke McKee (an exposé of pedophiles) in good faith during February on a platform I did a Veteran segment on. It turned out that while he is right on many things, he is wrong on many things...

Then myself and the owner of the platform were threatened with legal action ... He backed off quickly. The video was taken down in April.

Now one of the ones my guest mentioned and falsely accused of being OTO ... had waited until Christmas to threaten me and two of my mates the same way. Her name is Katrina Bailey...

14. In late January 2023, Ms Bailey searched the Australian Electoral Commission roll for the addresses of Mr McCrae and Mr Bell. The roll showed that Mr Bell resided at an address in Queensland (the **Electoral Roll Address**).

15. On 5 February 2023, a person operating the “Jesse Bell” Facebook account sent Ms Bailey a message stating:

Dean Mcrae [sic] and I offered you protection after I interviewed Luke McKee and Bottrill came after us. He backed off very quickly. Then you “come after” Dean and Dia out of sheer spite 9+ months after the fact...

16. On 3 March 2023, Ms Bailey filed a civil dispute application in the tribunal naming Mr McCrae, Ms Benitez and Mr Bell as respondents and claiming \$25,000 in damages for defamation. Ms Bailey claimed that the Video conveyed defamatory imputations about her, including that she was a member of a paedophile cult. Ms Bailey claimed that Resolute TV is owned by Dean McCrae and that the interview was conducted by Mr Bell who was a team member and contributor to Resolute TV.
17. In her application, Ms Bailey identified Mr Bell’s address as being the Electoral Roll Address.
18. On 17 March 2023, the tribunal’s registrar posted Ms Bailey’s civil dispute application to the three respondents, by way of service. The registrar stamped the application with a stamp indicating that the registrar had served the application and a “Form 4”, signed by the registrar to certify that the application had been served in that way. This is the registry’s usual process when serving documents under the *Service and Execution of Process Act 1992* (Cth) with the “Form 4” contained in a schedule to the *Service and Execution of Process Regulations 2018* (Cth).
19. On 21 April 2023, the tribunal held a directions hearing. At that directions hearing, a solicitor, Mr Boulos, told the tribunal that he appeared on behalf of the

first and second respondents (that is, Mr McCrae and Ms Benitez). The following exchange then occurred between the tribunal member and Mr Boulos:¹

Tribunal member: All right, is anyone here for or on behalf of the third respondent, Jesse Bell?

Mr Boulos: I am not instructed on that behalf on that regard so I really don't know.

Tribunal member: All right Mr Boulos, have you had any contact with Jesse Bell?

Mr Boulos: Yes my firm has had some contact with Mr Bell. Unfortunately he does not seek to be legally represented in this matter so that's the extent of my knowledge of his involvement in this matter.

Tribunal member: All right, thank you.

20. A preliminary hearing on the question of whether a concerns notice had been issued to each respondent, as required by section 124B(1)(a) of the *Civil Law (Wrongs) Act 2002* (the **Wrongs Act**), was held on 21 June 2023 and 31 July 2023. On 31 July 2023, Senior Member Stewart found that Ms Bailey had not provided a concerns notice to Ms Benitez, and dismissed the application against her.
21. The senior member provided reasons for his decision that Ms Bailey had provided a concerns notice to Mr Bell and Mr McCrae. He found that Ms Bailey's evidence was "sufficient to establish" that Mr Bell and Mr McCrae were "given the concerns notice in the sense that they read and had the opportunity to respond to the notice".² He also found, on the basis of Ms Bailey's evidence of Facebook Messenger exchanges, that Mr Bell had consented to the information in the concerns notice being given by means of an electronic communication, namely by the use of Facebook Messenger, for the purposes of subsection 8(1) of the *Electronic Transactions Act 2001*.³
22. On 5 October 2023, Senior Member Stewart held another preliminary hearing to determine whether the applicant had established the "serious harm element" of her claim; that is, whether the publication of defamatory matter about her has

¹ Statement of Katrina Bailey dated 23 May 2025, Annexure D.

² *Bailey v McCrae & Ors* [2023] ACAT 51 at [24]

³ *Bailey v McCrae & Ors* [2023] ACAT 51 at [39]

caused, or is likely to cause, serious harm to her reputation.⁴ At the end of that hearing, the Original Tribunal concluded that serious harm was established.⁵ Written reasons for that finding were given in the Original Tribunal’s final written decision.

23. On 10 November 2023, a substantive hearing was held in relation to Ms Bailey’s claims against Mr Bell and Mr McCrae. Mr Bell did not appear at the hearing. Mr McCrae was represented by the solicitors appearing in this appeal. Senior Member Stewart commented that, “with respect to service on Mr Bell, and his awareness of the proceedings here today”, the senior member was “satisfied that he’s been served and he’s chosen not to appear”.⁶
24. On 28 October 2024, Senior Member Stewart dismissed the application against Mr McCrae, finding that he was not a publisher of the Video. The senior member was, however, satisfied that the claim against Mr Bell was established. He stated in his reasons that orders were made in Mr Bell’s absence under section 47A of the *ACT Civil and Administrative Tribunal Act 2008 (ACAT Act)*. He also stated in his reasons that it was “not in dispute” that Mr Bell was a publisher of the Video.⁷ The senior member accepted that Mr Bell’s conduct had aggravated the hurt or injury suffered by Ms Bailey following the publication of the defamatory material.⁸ He ordered Mr Bell to pay Ms Bailey the sum of \$10,000, comprising \$5,000 for general damages and a further \$5,000 for aggravated damages.
25. On 27 November 2024, Mr Bell appealed from the decisions of Senior Member Stewart made on 10 November 2023 and 28 October 2024.
26. The application for appeal was lodged out of time. On 18 December 2024, President Daniel ordered Mr Bell to give to the Tribunal and the other parties any application under section 56(c)(i) of the ACAT Act seeking to set aside orders

⁴ Wrongs Act s 122A(1)

⁵ See *Bailey v McCrae & Ors* [2024] ACAT 82 at [12]

⁶ Transcript of hearing dated 10 November 2023, page 2, lines 33 to 36

⁷ *Bailey v McCrae & Ors* [2024] ACAT 82 at [40]

⁸ *Bailey v McCrae & Ors* [2024] ACAT 82 at [73]

made in his absence and evidence and submissions in support of that application and the application to extend time to appeal.

27. Mr Bell did not apply to set aside the Tribunal's orders. However, he filed a witness statement dated 17 January 2025 in support of his application for an extension of time.
28. On 5 February 2025, I held a directions hearing and made an order extending time to the date of lodgement of the appeal. I also made orders requiring the parties to exchange and lodge documents, including any proposed further evidence for the hearing of the appeal. I directed them to liaise to prepare an agreed index of documents for the appeal hearing. A note to my orders stated that parties should ensure their witnesses are available at the hearing of the appeal in the event that admission of fresh evidence on the appeal is permitted.

Evidence post-dating the original hearing

29. Both parties applied for leave to rely on evidence which was not before the Original Tribunal.
30. Under section 82(2)(c) of the ACAT Act, an appeal tribunal may, if leave is granted, receive further evidence about questions of fact, either orally in a hearing, by written statement or in another way.
31. The overarching principle to be applied when considering whether to allow new evidence on appeal is whether that would be in the interests of justice.⁹ Whilst it is not usually in the interests of justice to allow new evidence on appeal, in some cases it may be if there is an acceptable reason for the evidence not being brought at the original hearing.¹⁰ A material consideration when deciding whether to give an appellant leave to rely on further evidence on an appeal conducted by way of a rehearing, is whether the evidence is likely to have affected the outcome of the decision made at first instance.¹¹

⁹ *Kolodziej v Ali & Anor* [2021] ACAT 114 at [12](f); *Amer v Eriksson* [2019] ACAT 108 at [19]

¹⁰ *Amer v Eriksson* [2019] ACAT 108 at [20]

¹¹ *Krutskey v Commissioner for Social Housing* [2023] ACAT 68 at [7]; *Amer v Eriksson* [2019] ACAT 108 at [20]

32. I granted Mr Bell leave to rely upon his witness statement of 17 January 2025 and a witness statement of Georges Boulos, a solicitor, made on 16 May 2025. I decided that it was in the interests of justice to admit this evidence because one of the main grounds of appeal was that Mr Bell had not received a concerns notice or been served with Ms Bailey's civil dispute application. I considered that the evidence was potentially relevant to establishing those propositions. If it were to be accepted, as he claimed, that he had not been served with the application and was not aware of it, he would not have had an opportunity to provide that (or any other) evidence to the Original Tribunal. However, I told the parties at the hearing that there would be a question as to how much weight I would give the statements and that there was an issue as to the extent to which they were relevant in establishing error when they were not before the Original Tribunal.¹²
33. In his witness statement dated 17 January 2025, Mr Bell stated that he had not received a concerns notice from Ms Bailey via Facebook Messenger or at all and that he was not served with a copy of the originating process. He stated that he did not become aware of the proceedings until after the decision made by the Original Tribunal on 28 October 2024. Mr Bell's evidence is that he was informed of the proceedings by the second respondent, Dean McCrae, on 28 October 2024. Mr Bell also stated that he was not the owner or operator of Resolute TV.
34. Mr Bell's evidence is that he was living in a stated address in Queensland between 2020 and October 2024 (**Address B**), and that he was not living at the Electoral Roll Address. Mr Bell provided receipts from a real estate agent showing payment of rent, by him, at Address B between 9 March 2022 and 5 April 2022.
35. Mr Boulos stated in his witness statement of 16 May 2025, in response to Ms Bailey's allegation that he had taken instructions from Mr Bell during the first instance proceedings, that he had not done so. He stated that he did not recall ever speaking with Mr Bell, nor telling Ms Bailey that he had done so.
36. Ms Bailey sought leave to rely upon a witness statement which she made on 23 May 2025. This covered various topics, including Mr Bell's alleged awareness of the concerns notice, some of which Mr Bell dealt with in his statement. Mr Bell's

¹² Transcript of hearing dated 11 June 2025, page 7, lines 7-14

solicitor did not object to leave being granted to admit that statement into evidence. In those circumstances, I considered that it would be in the interests of justice to grant such leave, and did so.

Relevant legislation

37. A person may make a civil dispute application to the tribunal, by operation of section 17 of the ACAT Act. A “civil dispute application” is defined to include a damages application.¹³ A “damages application” is “an application for damages for negligence or for any other tort except nuisance or trespass”.¹⁴ It includes an application for damages for defamation.
38. The tribunal’s jurisdiction is limited to civil dispute applications claiming amounts of not more than \$25 000.¹⁵ The tribunal has, in relation to civil dispute applications, the same jurisdiction and powers as the Magistrates Court has under the *Magistrates Court Act 1930*, part 4.2 (Civil jurisdiction).¹⁶
39. Section 262 of the *Magistrates Court Act 1930*, in part 4.2, provides:

262 Cause of action arising, or defendant resident, outside ACT

The Magistrates Court has jurisdiction to hear and decide a proceeding if—

- (a) the defendant was resident in the ACT when the claim was served on the defendant, even though all of the cause of action in the proceeding arose outside the ACT; or*
- (b) both of the following apply, even though the defendant is not in the ACT:*
 - (i) a material part of the cause of action in the proceeding arose in the ACT, even though part of the cause of action arose outside the ACT;*
 - (ii) the claim is served on the defendant in Australia or an external territory.*

¹³ ACAT Act s 16(1)(b)

¹⁴ ACAT Act s 15

¹⁵ ACAT Act s 18

¹⁶ ACAT Act s 22(1)

40. Chapter 9 of the Wrongs Act is entitled “Defamation” and relates to the tort of defamation at general law.¹⁷ The objects of the chapter include to enact provisions to promote uniform laws of defamation in Australia.¹⁸
41. A person is required to give the proposed defendant a “concerns notice” before commencing defamation proceedings. Subsection 124B(1) of the Wrongs Act provides:

124B Defamation proceedings cannot be commenced without concerns notice

(1) An aggrieved person cannot commence defamation proceedings unless—

- (a) the person has given the proposed defendant a concerns notice in relation to the matter concerned; and*
- (b) the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice; and*
- (c) the applicable period for an offer to make amends has elapsed.*

42. The term “concerns notice” is defined in subsection 124A(1) of the Wrongs Act, which provides:

124A Concerns notices

*(1) For this division, a notice is a **concerns notice** if—*

(a) the notice—

- (i) is in writing; and*
- (ii) states the location where the matter in question can be accessed; and*

Example—location

a webpage address

- (iii) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the imputations of concern); and*
- (iv) informs the publisher of the harm that the person considers to be serious harm to the person’s reputation caused, or likely to be caused, by the publication of the matter in question; and*
- (v) for an aggrieved person that is an excluded corporation—also informs the publisher of the*

¹⁷ Wrongs Act s 118(1)

¹⁸ Wrongs Act s 115(a)

financial loss that the corporation considers to be serious financial loss caused, or likely to be caused, by the publication of the matter in question; and

- (b) *a copy of the matter in question is, if practicable, provided to the publisher together with the notice.*

Note Section 124B requires a concerns notice to be given before proceedings for defamation can be commenced.

- (2) *To remove any doubt, a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice.*

43. Section 122A(1) of the Wrongs Act provides for the “serious harm element” of a cause of action for defamation as follows:

122A Serious harm element of cause of action for defamation

- (1) *It is an element (the serious harm element) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*

44. Section 47A of the ACAT Act relevantly provides:

47A Procedure in absence of party

- (1) *This section applies if—*
 - (a) *the tribunal requires a party to appear either personally or by a representative before the tribunal in relation to an application; and*
 - (b) *the party fails to appear.*
- (2) *The tribunal may—*
 - ...
 - (b) *if the party is the respondent—decide the application;*
 - ...
 - (d) *do any of the following:*
 - (i) *continue with the hearing in the absence of the party either generally or in relation to any relief claimed in the application; ...*

Grounds of appeal

45. Mr Bell filed amended grounds of appeal on 22 May 2025. These were the same as the grounds originally filed with the application to appeal, except that he added an additional ground, being the first ground.

46. The first four grounds of appeal concern the alleged lack of compliance with legislative requirements concerning the service of the tribunal application upon Mr Bell and of the concerns notice upon him.

47. They are as follows:

Grounds in respect of Service

1. *That the Tribunal did err in determining the proceedings in the absence of Jesse Bell, wherein Mr Bell had not been served with Ms Bailey's application filed on 3 March 2023.*

Particulars

- 1.1 *That the Senior Member proceeded in the absence of any participation by Mr Bell, and in circumstances where Ms Bailey had provided no evidence of service that would satisfy the requirements of the ACT Civil and Administrative Tribunal Procedures Rules 2020.*
2. *That the Tribunal did err in its finding of fact that the Facebook page which was served by 'Messenger' application, was indeed operated by Mr Bell.*

Particulars

- 2.1. *That the Senior Member did err in finding that the Facebook page was operated by Mr Bell, the appellant, as there was no evidence to establish before the Tribunal to establish the factual basis for this finding.*
- 2.2. *That nowhere in evidence was it established or admitted that Mr Bell ran the page.*
- 2.3 *That the evidence was insufficient to establish, on the balance of probabilities, that Mr Bell personally operated the page.*
3. *That the Tribunal did err in application of s 8 of the Electronic Transactions Act 2001 (ACT) ("the Act"), in drawing an inference of consent to service of the concerns notice given under s 124A of the Civil Law (Wrongs) Act 2001 (ACT) ("Wrongs Act") by Facebook Messenger.*

Particulars

- 3.1. *That the Senior Member did err in his interpretation and application of the statutory definition at s 5 of the Act;*
- 3.2. *That the requisite standards to infer consent were not met, namely, that the conduct of the appellant could not meet the requirements for an inference to be drawn at law.*
- 3.3 *The mere fact that the appellant allegedly communicated in general terms with the respondent by Facebook Messenger, would not be indicative of a consent to receive service by that*

means, nor would it satisfy the indicia for an inference to be drawn.

4. *That the Tribunal did err in its finding that s 8 of the Act contemplates and permits the service of a ‘concerns notice’ by Facebook Messenger.*

Particulars

- 4.1 *That the Senior Member erred in finding that the application known as ‘Facebook Messenger’ was an appropriate means of electronic communication.*
 - 4.2 *That the application does not meet the standards of s 8(1)(b), i.e., that “it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference.”*
 - 4.2 *Unlike emails and other forms of electronic communications, made permissible for service by the various Acts of the ACT Legislative Assembly, ‘Facebook Messenger’ has an “unsend” feature, which renders messages unavailable at the discretion of the sender. Therefore, such messages are not presumed to be so permanent as to make them presumptively “usable for future reference” by a recipient of a concerns notice under the Wrongs Act.*
 - 4.3 *That this form of communication, though an electronic communication, is otherwise inconsistent with the accepted standards of service of legal documents, i.e., that a document be “given” to the recipient for their records permanently - as it can be “unsent” and therefore the recipient deprived of the communication.*
48. Grounds 5 to 7 of Mr Bell’s appeal grounds concern the Original Tribunal’s finding that the publication had caused, or was likely to cause, serious harm to Ms Bailey; its finding that Mr Bell was a publisher and when awarding damages. They are as follows:

Grounds in respect of Serious Harm

5. *That the Tribunal did err in paragraphs [24] – [39], in its application of s 122A of the Wrongs Act, in finding that serious harm had been established by the Applicant.*

Particulars

- 5.1 *That the Tribunal did err on the law, in its application of the test for serious harm propounded in the case of Supaphien v Chaiyabarn [2023] ACTSC 240.*

- 5.2 *That the Tribunal did err on a matter of mixed facts and law, in finding the Respondent's evidence was sufficient to establish that a 'serious harm' to reputation had occurred.*
- 5.3 *That the Tribunal did err on a matter of mixed facts and law, in finding that the Respondent's evidence was sufficient to establish causation between the 'serious harm' and the representations of Mr Bell.*

Grounds in respect of Publication

- 6. *That the Tribunal did err in its findings at paragraphs [40] – [55] relating to publication, in finding that the Appellant was the publisher.*

Particulars

- 6.1 *That the Tribunal did err on a matter of law in finding that the Appellant was a publisher in the absence of evidence.*
- 6.2 *That the Tribunal did err on a matter of mixed fact and law in finding that the Respondent's evidence was sufficient to draw an inference that Appellant was the publisher.*

Grounds in respect of Damages

- 7. *That the Tribunal did err in its finding at paragraphs [64] – [79] relating to the award of Damages to the Respondent.*

Particulars

- 7.1 *That the Tribunal did err at law, in making an award of damages, by failing to properly consider and apply s 139E of the Wrongs Act.*
- 7.2 *That the Tribunal did err on a matter of mixed fact and law, in finding that the Respondent's evidence was sufficient to establish any nexus between the quantum and non-economic loss.*
- 7.3 *That the Tribunal did err on a matter of mixed fact and law, in quantifying damages, by failing to consider the previous apology of the Appellant and finding without evidence that any such apology would be "insincere".*
- 7.4 *That the Tribunal did err as a matter of law in awarding aggravating damages in circumstances where the Respondent had not pleaded any basis for aggravated damages in her application.*
- 7.5 *That the Tribunal did err as a matter of mixed fact and law, between paragraphs [73] – [74], in awarding aggravated damages against the Appellant for his alleged communications.*

- 49. The Amended Grounds of Appeal were filed and served, without leave, on 22 May 2025.

50. On 5 May 2025, I made orders on Mr Bell's application, vacating a hearing listed for 8 May 2025 and extending the dates for compliance with previous timetabling orders. The new orders required Mr Bell to give to the tribunal and Ms Bailey a list of the errors of fact, errors of law or discretionary errors in the decision which affected the decision, by 9 May 2025. Mr Bell did not comply with that order but rather filed the Amended Grounds of Appeal, and other material, nearly two weeks later.
51. The Amended Grounds of Appeal are, in substance, a list of errors of fact, law and discretion. They were, as I have said, filed late. Ms Bailey understandably complained about Mr Bell's repeated non-compliance with the tribunal's orders, but did not claim to have been prejudiced by it. In those circumstances, I have allowed Mr Bell to rely upon the Amended Grounds.

Nature of the appeal

52. An appeal tribunal may, as it considers appropriate, deal with an appeal as a new application or as a review of all or part of the Original Tribunal's decision.¹⁹ Generally, the appeal tribunal determines how it is going to deal with an appeal at the first directions hearing.²⁰ That is what occurred in this case. On 5 February 2025, the appeal tribunal directed that the appeal hearing would proceed as a review of the original decision unless the appeal tribunal ordered otherwise.
53. In *Mansour v Dangar* [2017] ACAT 49, Presidential Member Daniel (as she then was) summarised the distinguishing features of the two different approaches to an appeal as follows:

For a new hearing, established principles dictate that the hearing starts afresh, evidence is given again, and the appeal tribunal's view on any question of fact or law is determinative of the issue. Any discretion to be exercised by the original tribunal is exercised anew by the appeal tribunal.

By contrast, for a rehearing, the appeal tribunal relies upon the evidence given to the original tribunal, supplemented by any additional evidence which the parties are given leave to adduce. The appeal tribunal's findings on questions of law are determinative. The appeal tribunal will not lightly substitute its own findings of fact for the original tribunal's primary findings of fact, but may be less constrained in relation to drawing

¹⁹ ACAT Act s 82(1)

²⁰ *Mansour v Dangar* [2017] ACAT 49 at [23]

inferences of fact. The appeal tribunal is not at liberty to interfere with a discretionary decision unless satisfied that there has been an error in the exercise of discretion. (Footnotes omitted)

54. I have adopted that approach to an appeal by way of rehearing in this case.

First Ground: Originating Application not Served

55. Mr Bell's first ground of appeal is that the Original Tribunal erred in proceeding to hear and determine Ms Bailey's application in circumstances where Mr Bell had not been served with it.

56. Ms Bailey's application gave Mr Bell's address as the Electoral Roll Address and also provided an email address for Mr Bell. The tribunal's file contains a listing notice which was sent to Mr Bell at the Electoral Roll Address, attaching Ms Bailey's application.

57. Service of the application upon Mr Bell is essential for the tribunal to have jurisdiction. As indicated above, the tribunal has the same jurisdiction as the Magistrates Court has under the *Magistrates Court Act 1930*, part 4.2. That court only has jurisdiction to hear a proceeding where the defendant is not in the ACT when the claim is served if, relevantly, the claim is served on the defendant in Australia.²¹

Relevance of and weight given to Mr Bell's statement

58. Mr Bell stated, in his statement of 17 January 2025, that he was not served with a copy of the originating process and only became aware of it when his lawyers brought it to his attention almost two years after it was filed by Ms Bailey.²²

59. I have decided to give Mr Bell's statement very little weight. That is for the following reasons.

60. As indicated above, Mr Bell's statement of 17 January 2025 was initially provided to the Tribunal and given to Ms Bailey in support of Mr Bell's application for an extension of time. Mr Bell did not comply with my directions of 5 February 2025 to give to Ms Bailey and the Tribunal a copy of any proposed

²¹ *Magistrates Court Act 1930* s 262

²² Witness Statement of Jesse Bell, filed 17 January 2025, paragraph 18.

further evidence for the hearing of the appeal and any submissions by 19 March 2025.

61. On 21 April 2025, Ms Bailey sent to the Tribunal and Mr Bell's solicitor a draft index of documents, stating in her email that this needed to be completed and submitted by 29 April 2025. Mr Bell's solicitor did not reply or take any steps to comply with my order requiring Mr Bell to liaise with Ms Bailey and file an agreed index of documents by 29 April 2025. Ms Bailey said at the hearing of the appeal, "I never received a draft index from the other party. I did try to co-ordinate, but it [sic: I] didn't hear from them."²³ Mr Kutasi, the solicitor appearing for Mr Bell, did not disagree.
62. On 30 April 2025 at 6.56pm, Mr Bell lodged an application for interim orders, seeking orders vacating the hearing listed on 8 May 2025. An urgent hearing of that application was held before me on 5 May 2025. Mr Kutasi, for Mr Bell, told the Tribunal that Mr Bell had been sick and in hospital and that Mr Kutasi had had difficulty getting instructions, but there was no evidence to support those assertions. Mr Kutasi did not adequately explain why he had not contacted the Tribunal when his client failed to comply with its directions, and why he left it to a week before the hearing before making his application to vacate the hearing. Both Mr Bell and Mr Kutasi as his authorised representative have an obligation to comply with the Tribunal's directions.²⁴
63. Despite the unsatisfactory nature of the application, I vacated the hearing and relisted it on 11 June 2025, in order to give Mr Bell a final opportunity to lodge his evidence and submissions. I ordered him to provide any proposed further evidence and any submissions by 9 May 2025, with Ms Bailey also having further time for lodging her material. Mr Bell was again directed to liaise with Ms Bailey to prepare and file an index of documents for the appeal hearing by 5 June 2025. Mr Kutasi assured me at the interim hearing that Mr Bell could comply with those directions.

²³ Transcript of hearing dated 31 July 2023, page 3, lines 9-10

²⁴ ACAT Act s 7A(b)

64. Mr Bell did not comply with any of them. On 22 May 2025, he filed Amended Grounds of Appeal, without leave, along with submissions, some transcripts, his witness statement of 17 January 2025 and a witness statement of Mr Boulos. Mr Bell's solicitor did not contact the Tribunal to request leave to file any of that material late, nor did he provide any evidence to explain the delay in complying with the Tribunal's directions.
65. In these circumstances, Ms Bailey could not have known until the day before her material was due whether or not Mr Bell was seeking leave to rely upon his statement of 17 January 2025. It had been prepared for the extension of time hearing and Mr Bell had not identified it as a document on which he relied in an index of documents. Ms Bailey filed her material, in accordance with the Tribunal's directions, the day afterwards, on 23 May 2025.
66. Mr Bell was not made available at the hearing for questioning (or at all). As indicated earlier in these reasons, a notation to my orders of 5 February 2025 stated that parties should ensure their witnesses are available at the hearing of the appeal in the event that admission of fresh evidence on the appeal is permitted.
67. Ms Bailey indicated that she would have liked to question Mr Bell about his statement "to find out what is the actual story."²⁵ She explained that she had not contacted Mr Bell's solicitor to ask him to make Mr Bell available for cross examination because she said she "was under the assumption that they'd actually said Mr Bell would be at hearing".²⁶ Mr Kutasi indicated that he disagreed. Ms Bailey identified a number of matters about which she wished to question Mr Bell.²⁷
68. Mr Kutasi informed the Tribunal that, if Ms Bailey wanted to cross examine Mr Bell, the Tribunal would have to take an adjournment.²⁸ He said he "strenuously" objected to that course,²⁹ indicating that Ms Bailey had ample opportunity to

²⁵ Transcript of hearing dated 11 June 2025, page 16, lines 9-10

²⁶ Transcript of hearing dated 11 June 2025, page 15, lines 46-47

²⁷ Transcript of hearing dated 11 June 2025, page 16, lines 14-36

²⁸ Transcript of hearing dated 11 June 2025, page 15, lines 41-42

²⁹ Transcript of hearing dated 11 June 2025, page 16, line 43

notify him that Mr Bell was required for cross examination but did not do so. He continued.³⁰

MR KUTASI: - - - you'll actually find that the appeal will succeed on different grounds, in any event, which will not require a rehearing in any event because the underlying application by Ms Bailey should have been dismissed from the very outset. So I think it's a moot point in any event, President.

PRESIDENTIAL MEMBER: Yes. Well, yes. As I understand your argument, Mr Kutasi, it is that the tribunal shouldn't have been satisfied on the evidence before it that your client had been served.

MR KUTASI: Correct.

PRESIDENTIAL MEMBER: So in that sense, that witness statement isn't - I mean, a finding to that effect, if you're right, could be made without the witness statement.

MR KUTASI: Yes. Absolutely.

69. Given Mr Bell's failure to comply with the appeal tribunal's directions, and his failure to make himself available at the hearing, notwithstanding the notation to my orders of 5 February 2025, it would be unfair to place a significant amount of weight on this statement.
70. I have also considered the first ground of appeal to be circumscribed by the particulars and the submissions made on behalf of Mr Bell in support of it. In other words, I have considered whether the Original Tribunal erred in determining the proceedings in Mr Bell's absence, where Mr Bell had not been served with the application, in circumstances where Ms Bailey had not provided evidence of service. That is a separate question from whether Mr Bell in fact knew about the application or had in fact received it, as Mr Kutasi implicitly acknowledged at the hearing. Mr Bell had an opportunity to lodge an application to set aside the Tribunal's orders under section 56(c)(i) of the ACAT Act, on the basis that the orders were made after hearing an application in the absence of a party, but chose not to do so.

³⁰ Transcript of hearing dated 11 June 2025, page 16, line 15-34

Was Ms Bailey’s application personally served on Mr Bell?

71. The *ACT Civil and Administrative Tribunal Procedures Rules 2020 (2020 Rules)*, which have been repealed, were in force when Ms Bailey filed her civil dispute application on 3 March 2023.
72. Rule 19(1) of the 2020 Rules provided as follows:

19 Who serves documents?

- (1) *The registrar must serve an application unless—*
 - (a) *the party lodging the document—*
 - (i) *undertakes to serve it; or*
 - (ii) *is required to serve it under these rules, a practice note or by order; or*
 - (b) *these rules provide for another form of service; or*
 - (c) *the registrar requires a person to serve the document.*

Note 1 For service of an application generally, see r 35 (8).

Note 2 A rule or practice note for each jurisdiction may set out how the registrar serves an application for the jurisdiction.

Note 3 An issuing party is required to personally serve a subpoena (see r 76).

73. The registrar was responsible for serving the application in this case by operation of rule 19(1) of the 2020 Rules. Mr Bell’s first ground is premised upon the erroneous assumption, repeated at the hearing,³¹ that Ms Bailey was required to serve the application. The particular to this ground, that the tribunal proceeded “*in circumstances where Ms Bailey had provided no evidence of service*”, reflects that misconception, as does Mr Bell’s submission that Ms Bailey was obliged to give the tribunal proof of service under rule 28(1) of the 2020 Rules.
74. The sealed application in the tribunal’s file contains a stamp indicating that the registrar served the civil dispute application in accordance with the *Service and Execution of Process Act 1992* (Cth) and in accordance with the tribunal’s usual processes. The stamp includes a certification that the application was served by sending a copy of it by pre-paid post to the respondents’ last known address, and appears to be signed by a registrar and dated, in handwriting, 15 March 2023.

³¹ Transcript of hearing dated 11 June 2025, page 13, lines 7-12

75. Rule 35(8) of the 2020 Rules provided, in relation to an application to start proceedings:

(8) *A sealed copy of the application must be served on all the other parties named in the application—*

(a) *by personal service; or*

(b) *as directed by the tribunal.*

76. The tribunal did not make any directions about service of the application, such that personal service was required.

77. Rule 24 of the 2020 Rules provided that, for service outside the ACT but within Australia, a “document must be served in accordance with the *Service and Execution of Process Act 1992* (Cwlth).”

78. Mr Bell did not refer in his written submissions to the *Service and Execution of Process Act 1992* (Cth). Mr Bell’s legal representative, Mr Kutasi, made a passing reference to that Act in his oral submissions, but did not refer to its provisions.³²

79. Part 4 of the *Service and Execution of Process Act 1992* (Cth) concerns the service of process of tribunals. Division 2 of Part 4, headed “Service of initiating and other process related to adjudicative functions,” applies, relevantly with respect to a proceeding in a tribunal in connection with the performance of an adjudicative function by the tribunal that concerns an act or omission within “the State in which the tribunal is established.”³³ The term “State” includes a territory such as the Australian Capital Territory (ACT).³⁴ An “adjudicative function,” in relation to a tribunal, means:³⁵

the function of determining the rights or liabilities of a person in a proceeding in which there are 2 or more parties, including the function of making a determination:

(a) *altering those rights or liabilities; or*

(b) *relating to any matters of a kind mentioned in section 48.*

³² Transcript of hearing dated 11 June 2025, page 14, line 7

³³ *Service and Execution of Process Act 1992* (Cth) s 48(a), (c) and s 47 (definition of “proceeding”)

³⁴ *Service and Execution of Process Act 1992* (Cth) ss 3(1) and 5(1)

³⁵ *Service and Execution of Process Act 1992* (Cth) s 3(1)

80. I am satisfied that the Original Tribunal was performing an adjudicative function that concerned an act or omission within the ACT. The relevant “acts” were the publication of the Video on the internet and its downloading in the ACT. The evidence indicates that Mr Bell likely conducted the interview the subject of the Video in Queensland. However, the evidence also indicates that the material was downloaded in the ACT. As Gleeson CJ, McHugh, Gummow and Hayne JJ observed in *Dow Jones & Co Inc v Gutnick*:³⁶

In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

81. For these reasons, Division 2 of Part 4 of the *Service and Execution of Process Act 1992* (Cth) applied to the service of Ms Bailey’s civil dispute application.
82. Section 50 of the *Service and Execution of Process Act 1992* (Cth), within Division 2 of Part 4, relevantly provides:

50 Initiating process may be served in any part of Australia

- (1) *An initiating process issued in a State may be served in another State.*
- (2) *Service on an individual must be effected in the same way as service of such an initiating process in the place of issue.*

83. Accordingly, the *Service and Execution of Process Act 1992* (Cth) required service of Ms Bailey’s civil dispute application to be effected in the same way as service of an initiating process in the place of issue, being the ACT. That is, it was required to be served in accordance with the 2020 Rules.
84. Rule 20(1) of the 2020 Rules concerns personal service. It provided:

20 Personal service

- (1) *In these rules:*
 - personal service**, of a document on a person means—
 - (a) *giving a copy of the document to the person; or*
 - (b) *personal service by post; or*

³⁶*Dow Jones & Co Inc v Gutnick* [2002] HCA 56 at [44]; Gaudron J expressing agreement at [56]

Note Rule 21 sets out the requirements for personal service by post.

- (c) *giving the document to the person in a way agreed by the person; or*
- (d) *if the person has instructed the person's solicitor to accept service for the person—serving the document on the person's solicitor; or*
- (e) *if the person is a corporation—serving the document on the corporation in a way mentioned in rule 23.*

Example—par (c)

A party may agree to receive an application by email.

85. Rule 21 of the 2020 Rules concerns personal service by post. It provided:

21 Personal service by post

- (1) *A document, including an application, may be served personally on a person (the recipient) by post if—*
 - (a) *if the recipient's address for service is an address in the ACT—the document is sent to the recipient by prepaid post in accordance with subrule (2); or*
 - (b) *if the recipient's address for service is an address outside the ACT but within Australia—*
 - (i) *the document is served in accordance with the Service and Execution of Process Act 1992 (Cwlth); and*
 - (ii) *the document is sent to the recipient by prepaid post in accordance with subrule (2).*
- (2) *The document must be sent in an envelope—*
 - (a) *addressed to the recipient at the recipient's address for service; and*
 - (b) *marked with the return address GPO Box 370, Canberra ACT 2601; but*
 - (c) *the return address must not be identified as the registry's address.*
- (3) *If the envelope contains an application and is returned to the registry by the postal authority as not having been delivered to the respondent—*
 - (a) *the application is taken not to have been served on the respondent; and*
 - (b) *the registrar must—*
 - (i) *if judgment has been entered on the basis of the postal service—set aside the judgment; and*
 - (ii) *tell the applicant—*

- (A) *that the application has not been served; and*
- (B) *if judgment has been set aside—that judgment has been set aside; and*

(c) *if the registrar has set aside the judgment—the applicant must, within 2 days after being told that judgment has been set aside, tell any enforcement agency that the judgment has been set aside.*

86. Pursuant to rule 26(b) of the 2020 Rules, a document is taken to be served under those rules if “the document is served by post in Australia in accordance with [the 2020 Rules]—7 days after the day it is posted, unless the contrary is proved”. Rule 26 is principally concerned with the timing of service, not with how service is effected.

87. Rule 29 of the 2020 Rules relevantly provides that, unless the tribunal or registrar orders otherwise, a party’s address for service must be the most recent address provided in the application.

88. I note also that section 11(3) of the *Service and Execution of Process Act 1992* (Cth) makes provision for when service is taken to have been proved. To the extent that it is inconsistent with rule 26(b) of the 2020 Rules, it would prevail. Section 11(3) provides:

(3) Service of a process, order or document under this Act by post on an individual is taken to have been proved only if the following are proved:

(a) it was sent by pre-paid post to the person’s last known address, or the person’s address for service in the proceedings concerned;

(ab) it was addressed to the person, or, if it was sent to an address for service that is the office of a solicitor, to that solicitor;

(b) the day on which it was posted.

89. The civil dispute application was sent to Mr Bell’s last known address (being the Electoral Roll Address) and also to his address for service in the proceedings concerned.

90. Contrary to Mr Bell’s submission, the Original Tribunal did not err in determining the proceedings in his absence, in circumstances where he had not been served. The Original Tribunal was entitled to conclude that Mr Bell had been served with

the originating application in accordance with the 2020 Rules and the *Service and Execution of Process Act 1992* (Cth) in circumstances where:

- a. the registrar served the application on him, in accordance with rule 19(1) of the 2020 Rules;
 - b. the registrar effected personal service by post, in accordance with rules 20(1)(b) and 21(1)(b) of the 2020 Rules, at the address specified in the application, in accordance with rule 29;
 - c. there is nothing to suggest that the envelope containing the application was returned to the registry, as contemplated by rule 21(3) of the 2020 Rules;
 - d. Mr Bell was served in accordance with the *Service and Execution of Process Act 1992* (Cth), as required by rule 24, because that Act required service to be effected in the same way as service of an initiating process in the ACT.³⁷
91. The remaining issue is whether Ms Bailey's nomination of Mr Bell's address as his address shown on the electoral roll rendered service ineffective. Section 101(4) of the *Commonwealth Electoral Act 1918* (Cth) provides:
- (4) *Every person who is entitled to have his or her name placed on the Roll for any Subdivision whether by way of enrolment or transfer of enrolment, and whose name is not on the Roll upon the expiration of 21 days from the date upon which the person became so entitled, or at any subsequent date while the person continues to be so entitled, commits an offence unless he or she proves that the non-enrolment is not in consequence of his or her failure to send or deliver to the Electoral Commissioner, a claim, duly filled in and signed in accordance with the directions printed thereon.*
92. Similarly, under section 65(3) of the *Electoral Act 1992* (Qld), a person is required to update his or her address within 21 days of changing address. Section 65(3) provides:
- (3) *If a person who is enrolled on an electoral roll for an electoral district changes address within the electoral district, the person must, within 21 days, give notice to an electoral registrar for the district in the form and way approved by the commission.*

³⁷ *Service and Execution of Process Act 1992* (Cth) s 50(2)

93. Mr Bell was under a legal obligation to update his address on the electoral roll within 21 days of changing address but, if his own evidence is accepted, he did not do so. According to Mr Bell's statement on 17 January 2025 (which was not before the Original Tribunal), he was living at Address B in Queensland between 2020 and 2024 but, when Ms Bailey searched the electoral roll in January 2023, it showed him to be living at a different address. Mr Bell did not explain in his statement whether he had ever lived at the Electoral Roll Address or, if so, when he lived there, and whether he had his mail forwarded or maintained a correction to that address. Nor did he explain why the address shown on the electoral roll was incorrect.
94. Service may be effective in some circumstances, even where the document in question was not actually received.³⁸ Personal service by post, under the 2020 Rules, and service by post under section 11(3) of the *Service and Execution of Process Act 1992* (Cth), do not require proof that the recipient received the document. It is not strictly relevant to Mr Bell's first ground of appeal whether he was aware of the proceedings or not.
95. The Original Tribunal was entitled to proceed in Mr Bell's absence, under section 47A of the ACAT Act, and did so. The entitlement of the tribunal to proceed with a hearing in a party's absence, under section 47(2)(d)(i) of the ACAT Act is to be read in the context of a party's entitlement to apply to set aside an order made in the party's absence, under section 56 of the ACAT Act, as a note to section 47 suggests. Any potential unfairness in the tribunal making orders in a party's absence is mitigated by the entitlement to make an application to set the orders aside.
96. Whilst it is not necessary for me to determine whether or not Mr Bell was aware of the proceedings before the Original Tribunal, and I do not do so, I note that there is some evidence to support the conclusion that he was so aware.
97. Mr Bell's evidence that he was unaware of the proceedings, if that is what his statement means, is in tension with Mr Boulos's statement to the Tribunal in the directions hearing on 21 April 2023 that his firm had had some contact with Mr

³⁸ *Newsnet Pty Ltd v Patching* [2011] NSWSC 690, esp at [41]-[42]

Bell but that he did not seek to be legally represented in the matter. In his statement dated 16 May 2025, Mr Boulos states that he did not take instructions from Mr Bell during the first instance proceedings and that he does not recall speaking with Mr Bell. That is not inconsistent with what Mr Boulos said at the directions hearing on 21 April 2023 about the contact between his firm and Mr Bell and Mr Bell's indication to the firm that he did not wish to be legally represented. Whilst the report about contact between Mr Boulos's firm and Mr Bell is hearsay, it appears to be credible. Mr Bell has not suggested that Mr Boulos's statement at the directions hearing was incorrect.

98. There is other evidence which casts doubt on Mr Bell's evidence that he did not know about the proceedings, and that he did not receive the civil dispute application. That includes the post from the "Jesse Bell" Facebook account, which I have found was operated by Mr Bell for reasons given below, on 24 December 2022 stating that Ms Bailey had threatened him and two of his "mates" in the same way as another person had threatened them; that is, with legal action. A similar comment was made in a post from that account on 28 December 2022. Whilst the civil dispute application had not been served at that time, it indicates an awareness on Mr Bell's part that it might be served and that Mr Bell likely discussed this with his "mates" at the time. Had Mr Bell made himself available for cross examination at the appeal hearing, questions might have been asked of him about conversations he had with Mr McCrae after this time, and whether Mr McCrae discussed the proceedings with him.
99. Mr Bell annexed receipts from a real estate agent showing payment of rent, by him, at Address B between 9 March 2022 and 5 April 2022. However, he has not provided any documentary proof of his residence in January 2023, when Ms Bailey searched the electoral roll for his address, or in March 2023, when the Tribunal's registrar sent the application to the Electoral Roll Address. As Ms Bailey pointed out at the hearing of the appeal, Mr Bell would have been required to vote in the period he said he did not live at the Electoral Roll Address. Had he made himself available for cross examination, the appeal tribunal may have asked him questions about whether it was an address of family or friends, and what contact, if any, he had with people living at that address in early 2023.

Conclusion on first ground

100. For the reasons given above, the first ground must fail. Mr Bell has not discharged his onus of proving that the Original Tribunal erred in proceeding in his absence where he had not been served with Ms Bailey’s application and in circumstances where Ms Bailey had provided no evidence of service that would satisfy the requirements of the 2020 Rules.

Grounds 2 to 4: Service of concerns notice by Facebook Messenger

101. Mr Bell’s second to fourth grounds of appeal challenge the Original Tribunal’s finding that Ms Bailey gave Mr Bell a concerns notice before commencing the proceedings, within the meaning of section 124B(1)(a) of the Wrongs Act. Mr Bell challenges:

(a) the Original Tribunal’s factual finding that Mr Bell operated the Facebook page which was served by Messenger application;

the Original Tribunal’s inference that Mr Bell had “consented” to service of the concerns notice by Messenger, within section 8 of the *Electronic Transactions Act 2001*; and

(c) the Original Tribunal’s conclusion that s 8 of the *Electronic Transactions Act 2001* contemplates the service of a concerns notice by Facebook Messenger.

Second ground: Was Original Tribunal wrong to conclude that Mr Bell operated the “Jesse Bell” account?

102. The first question, raised by second ground of appeal, is whether the Original Tribunal’s factual finding that Mr Bell operated the Facebook page which was served by Messenger application was erroneous and should be disturbed. In the particulars to Ground 2, Mr Bell claims that there was “no evidence ... to establish the factual basis for this finding”.
103. The Original Tribunal found that “the evidence provided by the applicant is sufficient to establish [Mr McCrae and Mr Bell] were given the concerns notice in the sense that they read and had the opportunity to respond to the notice”.³⁹

³⁹ *Bailey v McCrae & Ors* [2023] ACAT 51 at [24]

104. Mr Bell submitted in writing, in relation to Ground 2, that “[t]his standard of proof does not satisfy the test of the civil standard of proof outlined in *Briginshaw* [v *Briginshaw* [1938] HCA 34]”. I take that submission to be that the evidence relied upon by the Original Tribunal was not sufficient to satisfy it that the concerns notice had been served on Mr Bell, to the *Briginshaw* standard.
105. That submission is misconceived. *Briginshaw* does not import a different standard of proof from the civil standard, but rather is authority for the principle that the degree of satisfaction required in determining that the civil standard has been discharged may vary according to the seriousness of the allegations that are made. That principle may be relevant when determining whether a person has made a defamatory statement. It does not have much relevance to the question of whether a concerns notice has been served.
106. In order to succeed on the “no evidence” ground, Mr Bell needs to establish that there was no probative evidence before the Original Tribunal that he operated the “Jesse Bell” account. In *L&B Linings Pty Ltd v WorkCover Authority of New South Wales*,⁴⁰ Basten JA observed of the “no evidence” ground of judicial review that it:

depends not on the reasoning of the decision-maker, but on a comparison between the material available to the decision-maker and the conclusion reached. Secondly, care must be taken with the term "no evidence", as an administrative decision-maker is usually entitled to take into account material which would not count as "evidence" in a judicial context. In what is essentially an inquisitorial inquiry, that material is not necessarily limited to the material placed before the decision-maker by the applicant for review. Thirdly, it is important to bear in mind that the decision-maker may be entitled to seek support for a particular inference from the absence of material supportive of a contrary view. Fourthly, where an evaluative judgment is to be formed on the basis of conflicting indicators, it will be difficult if not impossible to establish a "no evidence" ground of review.

107. The Tribunal found that Ms Bailey had messaged each of the respondents the concerns notice on 7 November 2022.
108. Ms Bailey said in her submissions on appeal that the concerns notice was not sent to the “Jesse Eurekanzo” Facebook account, as Mr Bell claimed, but rather to the “Jesse Bell” Facebook account. Ms Bailey has provided evidence in an annexure

⁴⁰*L&B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15 at [34]

to her statement of 23 May 2025 that she sent the concerns notice to the “Jesse Bell” Facebook account via Messenger on 7 November 2022 and I am satisfied that this occurred.

109. Ms Bailey also provided to the Original Tribunal in an annexure to a submission by Ms Bailey dated 25 May 2023 a screenshot of a message sent from the “Jesse Bell” account to Ms Bailey on 6 April 2022. In the exchange between Ms Bailey and the “Jesse Bell” account, “Jesse Bell” referred to an offer of protection made by Mr McCrae and stated: “I have done nothing you have accused me of”. Another screenshot in evidence shows Mr McCrae making that offer of protection.
110. During the hearing on 31 July 2023, Ms Bailey told the Original Tribunal that on Christmas Eve, Jesse Bell “made a post that referenced the fact they’d received the concerns notice”. She then clarified that there was no mention of the concerns notice, but that Mr Bell had said that she had threatened them with legal action.⁴¹
111. A screenshot of a message from “Jesse Bell” to Ms Bailey on 23 December 2022, which was in evidence before the Original Tribunal and which is referred to above, states: “you cannot prosecute a civil case from another State or Territory”. That appears to reference, implicitly, Ms Bailey’s concerns notice. In a post dated 24 December 2022, “Jesse Bell” referred to his interview of Luke McKee then stated: “Then myself and the owner of the platform were threatened with legal action ...”. He said that person “backed off” then Ms Bailey “waited until Christmas to threaten me and two of my mates the same way.” Again, that may be taken to refer to Ms Bailey’s threat of defamation proceedings in the concerns notice.
112. Attached to Ms Bailey’s civil dispute application is a screenshot from “Jesse Bell” dated 3 February stating “Going live in 30 minutes with a pedophile hunter.” That post helps to establish that the “Jesse Bell” account is operated by the appellant, being the person who appeared in the defamatory interview. Other screenshots of messages and Facebook posts show the “Jesse Bell” account interacting with Ms Bailey in relation to the defamatory video.

⁴¹ Transcript of hearing dated 31 July 2023, page 6, lines 24-27

113. In support of this ground of appeal, Mr Bell relies upon the case of *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268. In that case, Macfarlan JA commented that:⁴²

the evidence before the primary judge did not in any event constitute a sufficient basis for the making of the substituted service order insofar as that order provided for notice to be given to Flo Rida by means of Facebook. The evidence (see [11(b) and (c)] above) did not establish, other than by mere assertion, that the Facebook page was in fact that of Flo Rida and did not prove that a posting on it was likely to come to his attention in a timely fashion (see Chappell v Coyle [1985] 2 NSWLR 73 at 77).

114. That case is not authority for the proposition that the Original Tribunal erred in concluding that the Facebook page operated by “Jesse Bell” was in fact operated by the appellant. There was probative evidence before the Original Tribunal, cited above, which supported that conclusion, including Ms Bailey’s oral evidence. It is relevant to note, additionally, that the tribunal was not bound by the rules of evidence, unlike the court in *Flo Rida*.
115. For these reasons, I do not accept that there was no probative evidence on which the Original Tribunal could conclude that he operated the account of “Jesse Bell.”
116. The evidence on appeal also supports that conclusion. In his statement dated 17 January 2025, Mr Bell admits to appearing on the YouTube video with Mr McKee, the subject of these proceedings. He also states that Ms Bailey contacted him “via Facebook Messenger in March 2022 to remonstrate with [him] about the McKee interview”. The annexed correspondence contains screenshots of messages with Ms Bailey’s Facebook name appearing at the top. These are in the same terms as those which Ms Bailey’s screenshots show were sent from the “Jesse Bell” Facebook account.
117. Accordingly, even if I am wrong to find that there was probative evidence before the Original Tribunal supporting its finding that Mr Bell operated the “Jesse Bell” Facebook account, evidence before me on appeal establishes that fact on the balance of probabilities.
118. The second ground is dismissed.

⁴² *Flo-Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 at [38]

Grounds 3 and 4: Did the Original Tribunal err in its reasoning about the application of the *Electronic Transactions Act*?

119. Mr McCrae and Ms Benitez submitted to the Original Tribunal that the requirements for service of a concerns notice under the *Electronic Transactions Act 2001* had not been met. The Original Tribunal considered whether the concerns notice had been validly served by applying the provisions of the *Electronic Transactions Act 2001*. It found that the history of communications between Mr McCrae and Mr Bell and Ms Bailey provided the inference for consent to the information in the concerns notice being given by means of an electronic communication, for the purposes of section 8 of the *Electronic Transactions Act 2001*.⁴³
120. I note, for completeness, that section 139O of the Wrongs Act, which permits a notice under Chapter 9 of the Wrongs Act to be served on a person by messaging or other electronic communication, had not commenced at the relevant time. It was inserted into the Wrongs Act by the *Civil Law (Wrongs) Amendment Act 2024* and was not in force in November 2022, so has no application in these proceedings.
121. By Ground 3, Mr Bell contends that the facts do not support a finding that he consented to “service” of the concerns notice by Facebook Messenger. Mr Bell submitted that the Original Tribunal erred in finding that a course of conduct in which parties regularly communicate by Facebook Messenger could constitute implied consent. He submitted:⁴⁴
- If it is said that the mere use of a medium automatically implies consent, then s 8(1)(c) would have no work to do. A notice giver would only need to establish that the recipient was indeed the person who was required to be given the notice.*
122. The relevant requirement under section 124B(1)(a) of the Wrongs Act, before an aggrieved person can commence defamation proceedings, is that the “person has **given** the proposed defendant a concerns notice” (emphasis added).
123. Subsection 8(1) of the *Electronic Transactions Act 2001* provides for circumstances in which a requirement to give information in writing is “taken to

⁴³ *Bailey v McCrae & Ors* [2023] ACAT 51 at [31], [39]

⁴⁴ Appellant’s Outline of Submissions filed on 22 May 2025 at [38]

have been met”. The term “giving information” includes “giving, sending or serving a notification”.⁴⁵ It is an inclusive term which is broad enough to include giving a concerns notice. Mr Bell did not suggest otherwise.

124. There is a question as to whether section 124B(1) of the Wrongs Act is a territory law under which “a person is required to give information in writing” for the purposes of subsection 8(1) of the *Electronic Transactions Act 2001*. The provision makes the giving of a concerns notice a prerequisite for commencing defamation proceedings, but, on one view, does not “require” a person to give the concerns notice. It may be that, under subsection 124B(1) of the Wrongs Act, “a person is permitted to give information in writing” within subsection 8(2) of the *Electronic Transactions Act 2001*. It is not necessary to decide this question because, in either case, there is a requirement that the recipient of the information “consents to the information being given by means of an electronic communication.”⁴⁶ The term “consent” is defined to include “consent that can reasonably be inferred from the conduct of the person concerned” but not to include “consent given subject to conditions unless the conditions are complied with”.⁴⁷
125. The Original Tribunal referred to the explanatory memorandum to the *Electronic Transactions Bill 2000*, as well as the revised explanatory statement accompanying the *Electronic Transactions Bill 1999* (Cth) (the law on which the *Electronic Transactions Act 2001* of the ACT was modelled).⁴⁸ The Original Tribunal then observed:⁴⁹

30. As the explanatory statements suggest, the question of consent is directed to the means or medium used, i.e., there is consent to the use of a form of electronic communication rather than relying on an alternative means of communication such as delivery of a letter by post. It is not a question of whether the recipient has consented to being given the content of the communication, in this case a concerns notice, but rather the use of electronic means to communicate that content.

31. There is limited case law on this issue, and none was presented by the parties. In my view, the terms of the *Electronic Transactions Act*, as

⁴⁵ *Electronic Transactions Act 2001*, s 8(5)(c)

⁴⁶ *Electronic Transactions Act 2001*, s 8(1)(c) and 8(2)(b)

⁴⁷ *Electronic Transactions Act 2001*, s 5 and Dictionary

⁴⁸ *Bailey v McCrae & Ors* [2023] ACAT 51 at [28]-[29]

⁴⁹ *Bailey v McCrae & Ors* [2023] ACAT 51 at [30]-[31]

confirmed by the explanatory statement accompanying introduction of those terms support a broad approach being taken to when consent may be inferred.

126. The Original Tribunal found that the issue of consent had to be determined at the time of the communication in question.⁵⁰ It identified the following factors as being relevant to whether Mr Bell, Mr McCrae and Ms Benitez had consented to the use of electronic communications:

(a) the prior use of electronic communications between Ms Bailey and the respondents;

(b) the content of those communications to the extent they relate to the subject matter of the communication in question;

(c) any opportunities presented to object to or condition the use of electronic communications; and

(d) the alternative forms of communication available.⁵¹

127. The Original Tribunal inferred that Mr Bell “consented to the use of electronic communication, and Facebook messenger in particular” because his exchanges with Ms Bailey indicate that he initiated communication with Ms Bailey in relation to the publications in question and actions that he could take in response.⁵²

128. The Original Tribunal did not find “that the mere use of a medium automatically implies consent”, as Mr Bell suggested it did.⁵³ Rather, it found that Mr Bell’s consent to the giving a concerns notice by means of an electronic communication (and in particular, by means of Facebook Messenger) could be inferred from Mr Bell’s use of Facebook Messenger to discuss the Video and actions that he could take in response to Ms Bailey’s concerns.

⁵⁰ *Bailey v McCrae & Ors* [2023] ACAT 51 at [32]. See also *Riley v St Vincent De Paul Society Canberra/Goulburn* [2025] ACAT 16 at [29]

⁵¹ *Bailey v McCrae & Ors* [2023] ACAT 51 at [34]

⁵² *Bailey v McCrae & Ors* [2023] ACAT 51 at [39]

⁵³ Appellant’s Outline of Submissions filed on 22 May 2025 at [38]

129. Mr Bell submitted that the mere fact that he communicated “in general terms” with Ms Bailey by Facebook Messenger did not indicate consent to be served by that means. The Original Tribunal inferred consent, however, not from communications “in general terms,” but rather from communications about the subject matter of the concerns notice.
130. I am not persuaded by Mr Bell’s submissions that the Tribunal erred in drawing an inference that Mr Bell had consented to service by Facebook Messenger. The express inclusion of “consent that can reasonably be inferred from the conduct of the person concerned” in the definition of “consent” in the *Electronic Transactions Act 2001* indicates a legislative intention to allow consideration of a person’s conduct generally. It is very unlikely that the legislature intended “conduct,” as it appears in the definition of “consent,” to be limited to conduct in relation to service (for example, whether the person had consented to service by electronic means in the past). In my view, the Tribunal’s approach of considering the use of electronic communications in the past, and the subject matter of those communications, is correct.
131. For these reasons, Ground 3 is dismissed.
132. By Ground 4, Mr Bell contends that the Original Tribunal erred in its finding that s 8 of the *Electronic Transactions Act 2001* contemplates and permits the service of a concerns notice by Facebook Messenger. He submits that serving a concerns notice in this way does not meet the standards of s 8(1)(b) of the *Electronic Transactions Act 2001*, being that “at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference”. The basis for this submission is Mr Bell’s assertion that Facebook Messenger has an “unsend” feature which renders messages unavailable at the discretion of the sender.
133. Ms Bailey’s position was that “when it comes to unsending, just like with email, you can only unsend a Facebook message before it has been seen”.⁵⁴
134. Mr Bell did not identify any evidence before the Original Tribunal to support his claim that Facebook Messenger has an “unsend” feature which renders messages

⁵⁴ Transcript of hearing dated 11 June 2025, page 38, lines 8-10

unavailable at the discretion of the sender. Nor did Mr Bell seek leave to provide any such evidence to the appeal tribunal. In the absence of any evidence to that effect, Mr Bell’s fourth ground cannot succeed.

135. I note that, contrary to Mr Bell’s position, section 8(1)(b) of the *Electronic Transactions Act 2001* may not require information to be readily accessible indefinitely. It may be that the words “at the time the information was given,” properly construed, mean that the question of ready accessibility is to be determined that time, and that, if information is readily accessible at time the information was given, such that it may be downloaded by the recipient then “for subsequent reference”, that is sufficient. However, in the absence of evidence to support Mr Bell’s contention about the way in which he says Facebook Messenger operates, it is not necessary to resolve this question of construction.

Ground 5: Serious harm

136. By Ground 5, Mr Bell contends that the Original Tribunal erred in its application of s 122A of the Wrongs Act,⁵⁵ in finding that Ms Bailey had established serious harm.
137. Section 122A(1) of the Wrongs Act provides that “[i]t is an element (the **serious harm element**) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person”. By section 122A(4), the question of whether the serious harm element is established may be determined before the “trial”.
138. In this case, the Original Tribunal held a separate hearing on the question of whether Ms Bailey had established the serious harm element on 5 October 2023. Ms Bailey relied upon witness statements from herself, David Bottrill and Lillian Bailey. The Original Tribunal noted, in its reasons for decision, that “[n]o written submissions or material was filed by either respondent in response to orders made on 31 July 2023 for consideration at the hearing of the serious harm element”. The transcript of hearing on that day indicates that there was no appearance for the respondents. At the hearing, Ms Bailey indicated that both Mr Bottrill and Ms

⁵⁵ See *Bailey v McCrae & Ors* [2024] ACAT 82 at [24] – [39]

Lillian Bailey were available for cross examination.⁵⁶ Ms Bailey gave some oral evidence at the hearing.

139. On 5 October 2023, the Original Tribunal made orders indicating that it had determined that the serious harm element as set out in section 122A of the Wrongs Act was satisfied. It provided reasons for its decision on the serious harm element at the conclusion of the substantive proceedings.

Reasoning of Original Tribunal on serious harm

140. The Original Tribunal correctly stated, in its reasons for decision, that serious harm is concerned with harm to reputation and not with harm to feelings or health.⁵⁷ It stated, again correctly,⁵⁸ that there must be evidence of the actual or likely future reputational damage arising from the tendency of the words and their actual impact on those to whom they were communicated.⁵⁹
141. The Original Tribunal found that the Video conveyed “extremely grave imputations” and inferred from “[t]he tone of the views expressed in the Video and the subsequent posts linking to the Video” that the Video’s content “is likely to be taken seriously by a significant proportion of those viewers”. It also referred to evidence that a substantial number of people had seen the Video, at least in part. The Original Tribunal accepted that the imputations in the Video were believed by some individuals and accepted Ms Bailey’s evidence that persons who knew her, at least through her social media persona, had viewed and commented on the Video.⁶⁰
142. In response to the “suggestion” that access to the Video had been restricted after a few weeks, the Original Tribunal accepted the evidence of Ms Bailey and Mr Bottrill that access was still available to the Video through use of the relevant URL, which could be found through searches.⁶¹ It found that the continuing

⁵⁶ Transcript of hearing dated 5 October 2023, page 4 at lines 14-17.

⁵⁷ *Bailey v McCrae & Ors* [2024] ACAT 82 at [35]

⁵⁸ See *Supaphien* at [107] and *Rader v Haines* [2022] NSWCA 198 at [19]-[24]

⁵⁹ *Bailey v McCrae & Ors* [2024] ACAT 82 at [35]

⁶⁰ *Bailey v McCrae & Ors* [2024] ACAT 82 at [36]

⁶¹ *Bailey v McCrae & Ors* [2024] ACAT 82 at [37]

ability to locate copies of the Video was relevant to the “grapevine effect” and the harm to reputation likely to arise in the future.⁶²

143. It indicated that it was satisfied that the harm to Ms Bailey’s reputation was more than merely substantial and determined that the serious harm element was met by her in this matter.⁶³

Mr Bell’s submissions on “serious harm”

144. Mr Bell relied upon the Curtin AJ’s discussion of the “serious harm” test in *Supaphien v Chaiyabarn* [2023] ACTSC 240 (*Supaphien*) at [101]–[121]. He submitted that there was “insufficient evidence to acquit the serious harm test required by *Supaphien*”.⁶⁴ He made the following additional submissions in support of that proposition:⁶⁵

64. First, in the absence of any witnesses other than her daughter and her advocate, Mr Bottrill – neither of whom attested they had a diminished opinion of her – it is hard to fathom how the Tribunal could conclude that she had acquitted such an onus.

65. Second, the Tribunal was presented with no actual evidence of anyone who had seen the video, nor anyone who had commented upon it to Ms Bailey. She merely vaguely asserted it, and Mr McCrae was denied any opportunity to cross-examine upon that. Additionally, a Jones v Dunkel inference ought to have been drawn by the failure of Ms Bailey to present anyone to the Tribunal to give such evidence firsthand.

66. Third, no evidence was led by Ms Bailey as to whether anyone had even seen anything in the publication that was defamatory. The whole video ran for something like an hour. It contained a wide-ranging conversation between the Appellant and his interview subject that covered many topics. The comments that Ms Bailey complains of was only a factional snippet of the video. Yet there is nothing in evidence as to who viewed that small fragment, if anyone.

67. Fourth, it is well-known that Ms Bailey is a frequent abuser of ACAT’s civil wrongs jurisdiction. She has no reputation that can suffer serious harm, and the Senior Member gave no consideration to this fact in his reasons.

68. Fifth, as is developed below in relation to the issue of damages, Ms Bailey never presented anything to the Tribunal that outlined her loss, save for hurt feelings, which are irrelevant to the test of serious harm. Ms Bailey certainly never asserted the existence of any economic loss.

⁶² *Bailey v McCrae & Ors* [2024] ACAT 82 at [37]

⁶³ *Bailey v McCrae & Ors* [2024] ACAT 82 at [38]

⁶⁴ Appellant’s Outline of Submissions filed on 22 May 2025 at [61]

⁶⁵ Appellant’s Outline of Submissions filed on 22 May 2025 at [64]–[71]

...

71. Additionally, it is highly notable that the award of damages in this matter was a mere \$5,000 (doubled for aggravation). So implicitly, the Tribunal through the determination of damage acknowledged that this was a matter that did not meet the test of serious harm because it made a merely nominal award of damages.

Ms Bailey’s submissions on “serious harm”

145. Ms Bailey submitted, at the hearing, that she provided significantly more evidence than evidence about people asking how she felt, including evidence about the abuse she received. She referred, in addition, to the seriousness of the imputations, and submitted that it could be inferred that allegations of serious criminal activity meet the serious harm threshold.⁶⁶

Consideration of serious harm ground

146. To the extent that Mr Bell’s ground concerns the sufficiency of evidence to support the Original Tribunal’s findings, as opposed to the absence of evidence, it does not raise an error of law. Mr Bell has also contended that the Original Tribunal made errors of mixed fact and law.
147. I will deal with Mr Bell’s points in the order he has adopted.
148. First, it was not necessary that Ms Bailey establish that her witnesses had a diminished opinion of her before the Original Tribunal could be satisfied of the serious harm element, as Mr Bell submitted. Ms Bailey’s evidence included that persons who knew her had viewed and commented on the Video. The Original Tribunal was entitled to rely upon that evidence. It is also relevant that the test of serious harm extends to evidence of likely reputational damage. In *Greenwich v Latham* [2024] FCA 1050, O’Callaghan J said at [163]:

The question of whether a statement has caused or is likely to cause serious reputational harm is a matter of fact, which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated.

149. His Honour cited, with apparent approval, a passage from the judgment of Richard Parkes KC in *Wilson v Mendelsohn* [2024] EWHC 821 (KB) at [241]:

⁶⁶ Transcript of hearing dated 11 June 2025, page 38, lines 32-46

(1)The ‘harm’ of defamation is the reputational damage caused in the minds of publishees, and may be (but does not have to be) established by evidencing specific instances of serious consequences suffered by a claimant as a result of the reputational harm.

(2)Serious harm may be shown by general inferences of fact, drawn from a combination of evidence about the meaning of the words, the situation of the claimant, the circumstances of publication and the inherent probabilities. That brings into play the scale of publication (but serious harm is not simply a ‘numbers game’), whether the statement complained of is likely to have come to the attention of anyone who knew the claimant, and the seriousness of the allegations complained of.

(3)It is relevant to consider the risk of percolation of defamatory allegations, especially on social media. It may in such cases be very hard to identify unknown publishees who thought less well of a claimant.

150. It was thus open to Ms Bailey to establish serious harm through general inferences of fact. Given the seriousness of the imputations, the unchallenged evidence as to the number of people who had viewed the Video, and the evidence that people who knew Ms Bailey had seen it or knew about it, the Tribunal was entitled to conclude that Ms Bailey had established that the publication of defamatory matter about Ms Bailey had caused, or was likely to cause, serious harm to her reputation.
151. As to Mr Bell’s second point, for reasons given above, it is not necessary for Ms Bailey to provide the Tribunal with evidence from a person who had seen the Video for it to be satisfied of the serious harm element. The Tribunal is not bound by the rules of evidence and may accept hearsay evidence. Further, direct evidence from a third party who had seen the Video is not necessary to establish likely reputational harm.
152. To the extent that Mr Bell submits that Mr McCrae was denied any opportunity to cross-examine Ms Bailey’s witnesses, that is incorrect. As indicated above, a hearing concerning the serious harm element was held and Mr McCrae did not appear at that hearing. Ms Bailey’s witnesses were available to be cross-examined. When Mr Kutasi complained that he had never had an opportunity to cross-examine Ms Bailey’s witnesses (on behalf of Mr McCrae) at a subsequent hearing, the senior member quite properly pointed out that there had been an opportunity to do so at the previous hearing.⁶⁷ It is hard to see, in any event, how

⁶⁷ Transcript of hearing dated 10 November 2023, page 7, lines 31 to 37

any denial of procedural fairness to Mr McCrae would properly found a complaint by Mr Bell.

153. There is no basis for drawing a *Jones v Dunkel*⁶⁸ inference on the basis of any failure of Ms Bailey to present anyone to the Tribunal “to give such evidence firsthand”. Mr McCrae apparently sought to raise the serious harm finding at the final hearing, after the issue of serious harm had been determined, conclusively, at a hearing held for that purpose. Ms Bailey’s witnesses were available to be cross-examined at the hearing about serious harm but no respondent appeared. This allegation is entirely without merit.
154. Thirdly, Mr Bell contends, there was no evidence was led by Ms Bailey as to whether anyone had even seen anything in the publication that was defamatory. He suggests that the viewers may not have watched the whole of the Video. In my view, the Original Tribunal was entitled to infer from the evidence as to the number of views of the Video, and Ms Bailey’s other evidence, that people had seen it or heard about it and that it was likely to cause serious harm to Ms Bailey’s reputation.
155. In any event, Mr Bell’s contention that Ms Bailey did not lead evidence about others seeing the Video is not accurate. Ms Bailey’s evidence included that she had “had friends disassociate due to the unpleasant nature of these materials”⁶⁹ and that the publication had “strained numerous friendships and relationships”.⁷⁰ She provided a timeline, which was accepted into evidence as part of the serious harm hearing,⁷¹ in which she stated that in February 2022 she was contacted by a YouTube viewer and informed about the Video, the viewer being concerned about the possible consequences of the content. The timeline also recorded that, on 6 April 2022, Ms Bailey had been contacted by a named person on Instagram, who stated that she was “suspect” and that between April and May 2022 she had been described as a “satanic jezebel” and a “pedophile protector” by people on Instagram. All of this is evidence from which it may be inferred that others had an awareness of the imputations in the Video.

⁶⁸ [1959] HCA 8

⁶⁹ Statement of Katrina Bailey, 31 March 2023 at paragraph 36

⁷⁰ Transcript of hearing dated 10 November 2023, page 141, lines 25 to 26

⁷¹ Transcript of hearing dated 10 November 2023, page 53, lines 46-47

156. Mr Bell’s fourth point is that “it is well-known that Ms Bailey is a frequent abuser of ACAT’s civil wrongs jurisdiction” and that she “has no reputation that can suffer serious harm”. That is a concerning submission to make and one for which no evidence was proffered. I reject it.
157. In relation to the fifth point, concerning an alleged lack of evidence of loss, the absence of loss is not determinative of serious harm. What needs to be shown is serious harm or likely serious harm to reputation, not economic loss.
158. Mr Bell’s submission that the quantum of the damages constitutes an implicit acknowledgement, by the Original Tribunal, that the serious harm test was not met, should also be rejected. An equally available argument is that the circumstance that the Tribunal found that serious harm had been established suggests that the amount of damages it awarded was too low.
159. I am not persuaded by Mr Bell’s submissions that the Original Tribunal erred in concluding that Ms Bailey had established that the publication of defamatory matter about her had caused, or was likely to cause, serious harm to her reputation. Mr Bell’s fifth ground is dismissed.

Ground 6: Publication

160. Mr Bell’s sixth ground is that the Original Tribunal erred in finding that Mr Bell was a publisher of the defamatory material. He says that he was not “Resolute TV,” the entity responsible for publishing the Video, and that there is no evidence that he participated in the publication.
161. In its reasons for decision, the Original Tribunal stated that it was not in dispute that Mr Bell was a publisher of the Video.⁷² It did not explain on what basis it found that he had published it. However, Mr Bell was directed to provide a response to the civil dispute application and, thereafter, was directed on multiple occasions to provide evidence in support of his case. He did not provide any documents to the Original Tribunal or participate in the proceedings in any way. The Original Tribunal was entitled to accept Ms Bailey’s evidence supporting her case that Mr Bell published the defamatory material. On one view, the failure to

⁷² *Bailey v McCrae & Ors* [2024] ACAT 82 at [40]

file a response or to appear in the proceedings is a deemed admission of Ms Bailey's claims, as contained in her civil dispute application.⁷³

162. Even if that is not so, there was sufficient material before the Original Tribunal for it to conclude, lawfully, that Mr Bell was a publisher of the Video.
163. In *Fairfax Media Publications Pty Ltd v Voller*⁷⁴ (**Voller**), three members of the High Court held that all that is required for publication is proof that the defendant voluntarily participated in the communication of the defamatory matter (that being sufficient to establish that publication was intentional).⁷⁵ The other two members of the High Court in the majority stated that every voluntary and active participant in the process of making matter available for comprehension by a third party is a publisher for the purposes of defamation law.⁷⁶
164. In *Google LLC v Defteros*⁷⁷ (**Defteros**), Kiefel CJ and Gleeson J (Gageler J, agreeing) referred to *Voller* and stated that “a person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher”.⁷⁸ Their Honours referred,⁷⁹ with approval, to the observation of Kiefel CJ, Keane and Gleeson JJ in *Voller*⁸⁰ that “the breadth of activity captured by the traditional publication rule is vast”. Edelman and Steward JJ, in that case, observed that there were four ways in which a defendant might be found to be a publisher of defamatory material:⁸¹

The first is where a defendant performs the actual act of communication. The other three are based on the attribution to a defendant of another's acts that form part of the process of communication: (ii) where a defendant authorises another to perform an act of communication and the communication is within the scope of that authority; (iii) where a defendant assists, in the sense of procures, provokes or conduces, another in performing the act of communication; and (iv) where a defendant ratifies or adopts the communication of another. (footnotes omitted)

⁷³ *Faithfull v Woodley* (1890) 43 Ch D 287 at 289, cited in *City of Stirling v Dueschen* [2011] WASC 126 at [48]

⁷⁴ [2021] HCA 27

⁷⁵ [2021] HCA 27, Kiefel CJ, Keane and Gleeson JJ at [18]–[22], [26]–[30], [32]

⁷⁶ [2021] HCA 27, Gageler and Gordon JJ at [59], [62], [66].

⁷⁷ [2022] HCA 27

⁷⁸ [2022] HCA 27 at [21]

⁷⁹ [2022] HCA 27 at [25]

⁸⁰ [2021] HCA 27 at [31]

⁸¹ [2022] HCA 27 at [200]

165. Ms Bailey submitted at the appeal hearing, in respect of the Original Tribunal's finding that Mr Bell had published the Video, that Mr Bell was the interviewer and that his face was on the Video.⁸² She also said that he opened the Video stating that it is his Video and that it is part of a series he is doing. She relied upon evidence that Mr Bell had further shared the Video and upon Mr McCrae's evidence that Mr Bell was responsible for the Video. Ms Bailey stated that Mr Bell had admitted to Mr Bottrill (who had also made a claim of defamation in relation to the same Video) that he was the publisher.⁸³ She referred to Mr McCrae's evidence that "Mr Bell was more than capable of adding and removing videos as he saw fit, and that he had full autonomy to do whatever he wanted with Resolute TV."⁸⁴
166. In her witness statement dated 19 October 2023, Ms Bailey provided evidence that Jesse Bell was sharing the Video around 27 March 2022. She annexed a post apparently forwarded from Mr Bell in which he stated "you can find the video at" then provided a website address.
167. Mr Bottrill's witness statement filed on 1 September 2023 contained evidence that Mr Bell had promoted the Video. Mr Bottrill stated in that witness statement:⁸⁵

The Resolute TV presenter Bell posted text introducing the video on both Youtube and Facebook which directed viewers to McKee's channel on the platform Bitchute:

'Ever wonder why high-ranking rock-spiders get away with it so much? Today we have our first guest on 'Day of Thunder' a brave man who is a refugee – Luke McKee. Who exposes pedophiles in the Australian and international elite be it government, deep state, media or otherwise in the public arena. ... Again I would like to say a massive thanks to Luke for coming on Resolute and exposing these arseholes. ...'

168. Annexed to David Bottrill's statement are print-outs of various posts made by Mr Bell, including one made a few days after the Video, which is as follows:

⁸² Transcript of hearing dated 11 June 2025, page 39, lines 1 to 8

⁸³ Transcript of hearing dated 11 June 2025, page 44, lines 31 to 35

⁸⁴ Transcript of hearing dated 11 June 2025, page 44, lines 37 to 39; see also Transcript of Hearing dated 10 November 2023, page 105, lines 33 to 36

⁸⁵ Witness statement of David Bottrill, filed 1 September 2023, paragraph 43

This man who is an Australian political refugee proves forensically the people involved in the pedo cult in Australia – including in the police, government, judiciary, sports, media (not least the ABC) and NGO's. You can find him in the description and further links in the comments below the video on YouTube. I warn you – this is a hard one: [followed by links to the Video on YouTube and Facebook]

169. In response to a comment following this post from a third party that the “whole depraved network of compromised and corrupt officials ... has got to be exposed”, Mr Bell replied, “agreed mate. I hear you.”
170. There is abundant evidence supporting the Original Tribunal’s conclusion that Mr Bell was a publisher and that he voluntarily participated in the communication of the defamatory matter. The evidence established that he conducted the interview the subject of the Video, in a “program” run by him, he invited Mr McKee to participate in the interview, he advertised it beforehand online and provided a link to the website on which it would be streamed, he provided a link to the Video afterwards in a social media post, endorsing Mr McKee’s comments and the position he took in the Video and, on Mr McCrae’s evidence, Mr Bell was capable of adding and removing videos to the Resolute TV channel. Mr Bell falls within the second, third and fourth categories of publisher as described by Edelman and Steward JJ in *Voller*.
171. Mr Bell contends, finally, that “Ms Bailey’s pleadings admitted that the ‘video was already depublished’ at the time she commenced proceedings” and submits that this means that “the demand in her Concerns Notice was heeded; meaning that there was no cause of action at the time of her application”.⁸⁶ Mr Bell did not provide any authority to support that proposition and I reject it.
172. Even if the proposition that a cause of action in defamation is extinguished upon a defendant “heeding” the demands in a concerns notice were legally correct (which I do not accept), the factual basis for Mr Bell’s claim is not made out. Ms Bailey’s civil dispute application plainly states that the Video “can still be viewed via these links” (which she provided in the application). Whilst the Video may have been taken down from the Resolute TV site, it was still available for viewing elsewhere at the time Ms Bailey lodged her application.

⁸⁶ Appellant’s Outline of Submissions filed on 22 May 2025 at [80]

173. For these reasons, the sixth ground must be dismissed.
174. Mr Bell’s seventh ground of appeal is that the Original Tribunal erred in its reasons for the award of damages. Mr Bell says that the Original Tribunal failed to properly consider and apply s 139E of the Wrongs Act; that it erred in finding that Ms Bailey’s evidence was sufficient to establish any nexus between the quantum and non-economic loss; that it erred in quantifying damages, by failing to consider Mr Bell’s apology and finding without evidence that any such apology would be “insincere”; in awarding aggravating damages, particularly in circumstances where Ms Bailey had not pleaded any basis for aggravated damages in her application.
175. In its reasons concerning general damages, the Original Tribunal set out section 139E of the Wrongs Act, which provides as follows:

139E Damages to bear rational relationship to harm

In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

176. I am not persuaded that there was no rational relationship between the alleged harm suffered by Ms Bailey and the award of \$5,000 in general damages, as Mr Bell submits.⁸⁷ Assessing damages in a defamation action is “essentially a matter of impression and not addition”.⁸⁸
177. The Original Tribunal referred⁸⁹ to the principles for determining an award of general damages, as set out in *Wilson v Bauer Media Pty Ltd*.⁹⁰ It stated that it had considered the evidence given in cross-examination by the applicant and Lillian Bailey to be generally credible and supportive of the evidence provided in their witness statements.⁹¹ It commented that the gravity of the imputations in the defamatory material was “substantial” and that the accusation that Ms Bailey was a member of a group which engaged in child sexual assault was “very serious”.

⁸⁷ Appellant’s Outline of Submissions filed on 22 May 2025 at [85]

⁸⁸ *Lazarus v Aziz* [2015] ACTSC 344 at [31], citing *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1072 and *Humphries v TWT Ltd* (1993) 120 ALR 693 at 700

⁸⁹ [2024] ACAT 82 at [66]

⁹⁰ [2017] VSC 521 at [59]

⁹¹ [2024] ACAT 82 at [67]

The Original Tribunal referred to the number of views of the original material; to the grapevine effect which was “likely to be substantial”; to the evidence that the Video had been viewed by people with whom Ms Bailey associates; to the abusive comments about Ms Bailey on social media; and to the adverse health effects suffered by Ms Bailey due to the effect on her reputation and other matters.⁹² It also found that the “relatively short time in which the Video was available” was a relevant factor when assessing damages.⁹³ It concluded:⁹⁴

77. Having considered the cases referred to in submissions by the applicant, taking into account the serious but indirect nature of the accusation, limited time in which the Video was available from the Resolute TV sites, and evidence of harm presented, I consider that an award of \$5,000 for non-economic loss to be appropriate given the hurt and injury suffered due to the initial publication of the defamatory material and effect on and vindication of the applicant’s reputation.

178. Mr Bell submits:⁹⁵

87. This reasoning does not outline which cases referred to in the submissions by the applicant (being Ms Bailey), nor any analysis of how they compare to the facts of her application. It’s as if the Senior Member simply decided that \$5,000 seemed like a nice round number to select.

179. It may be accepted that the Original Tribunal did not analyse, in its reasons for decision, the cases on which Ms Bailey relied. That would have been desirable, but the absence of such analysis may be explained by the circumstance that no argument was presented on behalf of Mr Bell to the Original Tribunal as to why those cases should not apply. Further, each case must be considered on its own facts when damages are awarded.

180. I do not accept that “the Senior Member simply decided that \$5,000 seemed like a nice round number to select”, as Mr Bell contends. The Senior Member took into account the gravity of the imputations in the defamatory material, the number of views and the grapevine effect, and Ms Bailey’s evidence as to the adverse effect upon her of publication; and discounted the amount which might otherwise have been awarded by reference to the limited time the Video was available and

⁹² [2024] ACAT 82 at [68]

⁹³ [2024] ACAT 82 at [69]

⁹⁴ [2024] ACAT 82 at [77]

⁹⁵ Appellant’s Outline of Submissions filed on 22 May 2025 at [87]

the indirect nature of the accusation. Mr Bell’s submission that he “ought to have received some credit for removing the publication”⁹⁶ overlooks the circumstances that there was no evidence that he did remove the publication and that the Original Tribunal took into account the limited time the Video remained available on the Resolute TV site. Bearing in mind that assessing damages in defamation is a matter of impression, Mr Bell has not established that the Original Tribunal erred when doing so, or that it failed to properly consider and apply s 139E of the Wrongs Act.

181. Mr Bell claimed that the Original Tribunal erred by failing to take into account his apology. It is not surprising that the Original Tribunal did not refer to each matter which may have been favourable to Mr Bell in circumstances where Mr Bell did not participate in the proceedings. Mr Bell did not provide evidence to the Original Tribunal of having made an apology to Ms Bailey, within s 139I of the Wrongs Act. Mr Kutasi did not make any submissions about Mr Bell’s apology at the hearing of the appeal, and it is not entirely clear from the written submissions what is said to constitute that apology. It may be that, by an “apology,” Mr Bell is referring to his message to Ms Bailey on 3 April 2022, in which he stated, “if you need protection we will provide it”. After a strongly-worded exchange, particularly on the part of Ms Bailey, Ms Bailey texted: “so no apology for publishing Luke’s lies... for agreeing I should be dead? Hmmm.” Mr Bell replied: “Apology for fucking what? Flip the script you fucking lunatic.”
182. The Original Tribunal did not err in failing to take into account the statement made on 3 April 2022 (if indeed it was not taken into account). That statement was followed by various inflammatory statements and posts made by Mr Bell in the following weeks and months, some of which were made publicly, when Mr Bell did not receive the response from Ms Bailey which he apparently expected.
183. Mr Bell also submits that the award of aggravated damages was affected by error, because Ms Bailey did not seek aggravated damages in her application. He claims that the award of aggravated damages was a denial of procedural fairness.
184. As Mr Bell submits, there was no mention of aggravated damages in Ms Bailey’s application. However, in the box on the application form next to the words

⁹⁶ Appellant’s Outline of Submissions filed on 22 May 2025 at [90]

“Amount claimed”, Ms Bailey wrote “\$25,000.” There was nothing on the application form asking the applicant to identify what kind of damages were sought.

185. The Original Tribunal may have denied Mr Bell procedural fairness if it had awarded Ms Bailey more than the amount she sought in the application. That was not the case here.
186. The claim for aggravated damages was raised by Ms Bailey during the proceedings before the Original Tribunal. In her submissions on serious harm filed on 1 September 2023, Ms Bailey referred to some case law and to what she described as “further attacks by the defamatory video creators,” then stated: “it can be argued that the further attacks by the defamatory video creators would aggravate the harm caused by the defamatory materials”. The issue of aggravated damages was alluded to by Ms Bailey at the hearing on 10 November 2023. Ms Bailey stated, in response to a question from the Senior Member about whether she was seeking the same orders in relation to Mr Bell and Mr McCrae, “I do think Mr Bell’s behaviour has been somewhat more aggravating” (than that of Mr McCrae).⁹⁷ The Original Tribunal remarked, “you’re seeking aggravated damages in relation to the conduct, as I’ve just heard you correctly, for both Mr McCrae and Mr Bell”.⁹⁸ Mr Kutasi, appearing for Mr McCrae, did not object to Ms Bailey’s application for aggravated damages.
187. I am satisfied that Mr Bell was given an adequate opportunity to respond to the claim for aggravated damages. He was notified, by letter sent to the Electoral Roll Address, of the hearing on 10 November 2023 and was, generally, given an opportunity to participate in the proceedings. Mr Bell’s claim that “Ms Bailey had not pleaded any basis for aggravated damages in her application” is misconceived because the tribunal is not a court of strict pleadings. The tribunal is entitled to decide its own procedure.⁹⁹ The Original Tribunal did not make any direction that the parties provide pleadings and the application did not constitute a “pleading”.

⁹⁷ Transcript of Hearing dated 10 November 2023, page 142, lines 37-38

⁹⁸ Transcript of Hearing dated 10 November 2023, page 142, lines 45-47

⁹⁹ ACAT Act s 23(1)

188. I also reject Mr Bell’s claim that, in awarding aggravated damages, the Original Tribunal “jumped to many findings of fact” which could not be supported by the evidence. The Original Tribunal had sufficient evidence on which to ground its factual findings and Mr Bell did not provide any evidence to refute Ms Bailey’s evidence. Further, the finding that any future apology by Mr Bell would be insincere was not taken into account in relation to aggravated damages, but was made in order to reject Ms Bailey’s application for an order requiring him to issue an apology. The material before the Original Tribunal amply demonstrates that Mr Bell conducted himself in a way which aggravated the harm caused.

Conclusion

189. For the reasons given above, Mr Bell has not established that the Original Tribunal erred in any of the ways claimed by him. His application for appeal must therefore be dismissed.

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 Presidential Member J Lucy

Date(s) of hearing:	11 June 2025
Solicitors for the Appellant:	Solve Legal
First Respondent:	In person
Solicitors for the Second Respondent:	Solve Legal